

PB SECURITIES SDN. BHD.

v.

ABDUL RASHID BIN MOHAMED

HIGH COURT, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. D2-22-1177-1993]
13 JUNE 1994

PRACTICE & PROCEDURE: Order 14 proceedings - Application for summary judgment - Affidavits - Filing and service - Prescribed time - Defendant filing affidavit in reply 18 days after service of affidavit in support of application - Whether filing of affidavit in reply out of time - Order 32 r. 13(2) RHC 1980 - Whether O. 32 rule 13(2) applicable to O. 14 applications.

The plaintiff applied by way of summons in chambers for summary judgment under O.14 Rules of the High Court 1980 (RHC). The summons and the supporting affidavit were later served on the defendant and eighteen days after being so served, the defendant filed and served on the plaintiff his affidavit in reply.

The plaintiff, relying on O. 32 r.13(2) RHC and the decision in *Malayan Banking Berhad v. Siong Electronic Industries*, sought to challenge the validity of the service of the defendant's affidavit in reply and contended, *inter alia*, that the said affidavit, by virtue of the provisions of r. 13(2) hereof, was served out of time and ought not to be allowed.

The defendant submitted that the application having been brought under O.14, it is to that Order that the Court should look for the governing procedure and that O.32 r. 13(2) in the circumstances is not applicable. It was further asserted that the ruling in *Malayan Banking* case was given *per incuriam* as the phrase "save as otherwise provided in these rules" attendant to the said Rule was not then pointed out to the learned Judge.

The issue that arose was whether on the facts of this case the provisions of O. 32 r. 13(2) applied to the O.14 application of the plaintiff.

Held:

[1] A perusal of the judgment in *Malayan Banking* case indicates that throughout the learned Judge devoted himself to only one question placed before him and that is whether the amendment to r. 13 had retrospective effect and in the end His Lordship ruled that the amendment applied retrospectively. This being the

a case that decision cannot be taken as an authority to support a proposition that r. 13(2) applies to O. 14 proceedings.

[2] The applicability of r. 13(2), as expressly stated therein, is subject to the phrase "save as otherwise provided in these rules". There is therefore no discernable incompatibility between O. 14 and r. 13(2) and the two provisions can and do operate harmoniously with each other.

b [3] In giving proper construction to the provisions in issue, the maxim "*generalia specialibus non derogant*" ought to apply. Hence, the provisions of r. 13(2), being the subsequent general provisions, cannot be said to have intended to interfere with the prior special provisions of O. 14 r.2(3). It follows that the provisions of O. 32 r. 13(2) RHC do not apply to proceedings brought under O.14 of the Rules or to affidavits filed or intended to be filed thereunder.

c [Defendant's affidavit stands filed as of right].

Per Curiam

There is nothing in the Rules giving a plaintiff a right to file an affidavit in reply to a defendant's affidavit, unlike the case of a defendant. Hence, to do so a plaintiff will need to obtain the leave of the Court.

Cases referred to:

Malayan Banking Bhd. v. Siong Electronic Industries [1981] Sdn. Bhd. & Ors. [1994] 1 MLJ 704 (**dist**)
Proprietors of Strata Plan No 159 v. Parramatta City Council [1985] 55 LGRA 363 (**fol**)
Barker v. Edger [1898] AC 748 (**fol**)
Hasker v. Wood [1885] 54 LJQB 419 (**fol**)
Bostock v. Ramsey UDC [1900] 1 QB 357; [1900] 2 QB 616 (**refd**)
Reeve v. Gibson [1891] 1 QB 652 (**refd**)
Symon & Co. v. Palmer's Stores [1903], Ltd. [1912] 1 KB 259 (**refd**)
g *Davies v. Spence* [1876] 1 CPD 719, 25 WR 229, 2 Char Pr Cas 235 (**refd**)
Grivin v. Grepe [1879] 13 ChD 174; 49 LJ Ch 63; 41 LT 522, 28 WR 123 (**refd**)
Rotherham v. Priest [1879] 49 LJQB 104; 41 LT 558; 28 WR 277 (**refd**)

h **Legislation referred to:**

Rules of the High Court 1980, O. 3 r. 2(2), O. 14 rr. 1, 2(3), 3(1), 4(1), O. 18 r. 1, O. 32 rr. 3, 13(2)(b), O. 62 r. 8

Other sources referred to:

Aktin's **Encyclopaedia of Court Forms in Civil Proceedings**, 2nd Edn., Vol. 29, pp. 192, 193
i **Supreme Court Practice 1993**, Vol. 1, paragraph 14/3-4/3 and 32/1-6/8

For the plaintiff- Soh Choh Piau; M/s Paul Cheah & Associates
For the defendant- Ernest J.K. Azad; M/s Rahman Too & Co.,
Amicus Curiae K. Balaguru; M/s K. Balaguru

JUDGMENT

Richard Talalla J:

On 1 April 1994, the plaintiff applied by summons in chambers under O. 14 of the Rules of the High Court 1980 (the Rules) for summary judgment. The said summons was issued on 20 April returnable before me on 19 May and served on the defendant's solicitors on 22 April at 4.25pm together with an affidavit in support. An affidavit in reply was filed and served on 11 May. Order 32 r. 13(2) of the Rules reads as follows:

(2) Save as otherwise provided in these rules:

- (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
- (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

The affidavit in support having been served after 4.00 pm, for the purpose of computing the period of time after service thereof, that affidavit has to be deemed to have been served on the following day. See O. 62 r. 8 of the Rules. Such being the case the last day for service of the affidavit in reply in accordance with r. 13(2)(b) was 7 May. See O. 3 r. 2(2) of the Rules. The affidavit having been served on 11 May, the plaintiff argued that it is out of time and therefore should not be considered. In this regard reliance was placed on the case of *Malayan Banking Bhd v. Siong Electronic Industries* [1981] Sdn Bhd & Ors. [1994] 1 MLJ 704 which also concerned an application under O. 14 and to which the provisions of r. 13(2)(b) were applied and where the Court disregarded 2 affidavits which were purportedly served out of time and in breach of the said provisions.

Counsel for the defendant submitted that the application having been brought under O. 14 it is to that Order that the Court should look for the procedure governing this application, that r. 2(3) of that Order governed the situation and such being the case r. 13(2) did not apply to the

a application; also that the decision in the ***Malayan Banking*** case abovestated was given *per incuriam* as it was not pointed out to the learned Judge that r. 13(2) is applicable only save as otherwise provided in the Rules, as expressly stated in r. 13(2). It was further argued on behalf of the defendant that the attention of the learned Judge was not directed to the specific provisions of r. 2(3) of O. 14 which by reason of the time stated therein rendered r. 13(2) inapplicable.

b A perusal of the judgment in that case indicates that the learned Judge throughout devoted himself to the one question placed before him and that is whether the amendment to r. 13 had retrospective effect and in the end His Lordship ruled that the amendment applied retrospectively. Accordingly I do not see that decision as authority supporting a proposition that r. 13(2) applies to O. 14 proceedings.

c As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No 159 v. Parramatta City Council* [1985] 55 LGRA 363 at 364, per Kirby P (NSW CA) it was stated that so far as is consistent with the language used, Courts should endeavor to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v. Edger* [1898] AC 748 at 754, per Lord Hobhouse (PC) it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v. Wood* [1885] 54 LJQB 419 and *Bostock v. Ramsey UDC* [1900] 1 QB 357; [1900] 2 QB 616 and the Country Courts, see *Reeve v. Gibson* [1891] 1 QB 652.

d Applying the principles of construction abovestated I do not discern anything incompatible between O. 14 and r. 13(2). There is nothing to reconcile between them. They can and do operate harmoniously with each other. I find there is no need to rely on the presumption, as abovestated O. 32 as captioned therein relates to applications and proceedings in chambers. In the absence of anything else this Order is to apply generally. Rule 13(2)(b) is, as expressly

stated therein, to apply save as otherwise provided in the Rules. Hence the maxim "*generalia specialibus non derogant*" fits into the construction of this provision like a hand in a glove. In truth the maxim is superfluous. The provision speaks for itself. Order 14 is then looked at for other provisions and it is discovered that under r. 2(3) thereof the O. 14 summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day. Accordingly it seems that the subsequent general provisions of r. 13(2) are not intended to interfere with the prior special provisions of O. 14 r. 2(3); *a fortiori* because of the express saving in r. 13(2) as set out above.

By reference to r. 4(1) of O. 14 a defendant may show cause against an application under that Order by affidavit or otherwise to the satisfaction of the Court. Experience has shown that almost always a defendant seeks to show cause by affidavit. Indeed in England the masters usually require an affidavit before they can be "satisfied". See the **Supreme Court Practice 1993**, Vol. 1, marginal paragraph 14/3-4/3. Counsel for the plaintiff submitted that there was no provision in r. 2(3) or anywhere else for time within which this affidavit is to be filed and that being the case r. 13(2) had to apply to the filing of such an affidavit and likewise to a plaintiff's affidavit in reply to a defendant's affidavit. I do not consider that to be so. It is implicit from the provisions of r. 2(3) and by long established practice that a defendant must in this country file his affidavit by the return day; in England, as shall be explained presently, not less than 3 clear days before the return day. I can do no better in this regard than to refer to and respectfully adopt the passage in Atkin's **Encyclopaedia of Court Forms in Civil Proceedings**, 2nd Edn., Vol. 29, pp. 192 and 193:

There is no express provision in the Rules of the Supreme Court which specifies any particular time for service of the defendant's affidavit, but clearly such an affidavit should be served in good time on the plaintiff, to enable him to have a reasonable opportunity to deal with it before the return day. The form of summons contains an express notice to the defendant requiring him to send a copy of his affidavit in answer to the plaintiff or his solicitor to reach him not less than three days before the return day, and the master will exercise his discretion as to the costs of any adjournment occasioned by the late production of the defendant's affidavit.

a In England summonses under O. 14 are returnable not less than ten clear days after service. See Practice Direction (Order 14: Return Date) 1970 1 WLR 258. Also in that country the form of O. 14 summons contains an express notice to the defendant requiring the defendant to send a copy of his affidavit in answer to the plaintiff or his solicitor to reach the same not less than 3 days before the return day. There is no such notice in our corresponding form of summons.

b Apart from the express provisions of O. 14, over a period of more than 100 years, a vast body of case law has established the practice and procedure governing proceedings under O. 14. As far back as the year 1911 in *Symon & Co. v. Palmer's Stores* [1903], Limited [1912] 1 KB 259. Buckley LJ at page 266 warned that whereas as a rule there must be a trial first and then judgment, under the Order XIV procedure there is judgment at once and never any trial and that accordingly such a procedure must be strictly confined to the specific cases provided in the Order. In the same case Vaughan Williams LJ at page 264 said:

c Order XIV makes, no doubt, a very salutary provision for the purpose of preventing a defendant, who knows perfectly well that he owes the sum claimed, from postponing the time of payment, and putting the plaintiff to further expense in a litigation which ought never to have taken place; but on the other hand Order XIV is an Order which can be, and often is, abused. A plaintiff's legal adviser may advise him that, though there is not much prospect of his getting judgment under Order XIV., and the defendant may have to swear an affidavit in answer to an application for judgment, in which he will have to disclose on oath what defence he is going to set up, and that may be a great assistance to the plaintiff at the trial, and therefore such an application should be made. I hope that this does not occur, but I think that such a course is sometimes taken, and in my opinion that is a manifest abuse of the process of the Court.

d Thus from the earliest times the Court had set the blueprint for the procedure to be adopted in applying the provisions of O. 14.

e A competent solicitor acting for a prospective plaintiff in an appropriate case will have in mind this blueprint and from the earliest time, that is to say when first taking instructions and proofing potential witnesses there will be born in such solicitor's mind a question namely whether or not to advise proceeding under the

Order for summary judgment. If it is decided so to proceed the plaintiff is best advised, notwithstanding the provisions of O. 18 r. 1, to file the writ of summons accompanied by a statement of claim and the O. 14 summons forthwith upon appearance being entered and serve the same immediately upon it being issued, despite the provisions of r. 2(3). The plaintiff having thus acted with alacrity would have set by example a tight timetable to which the defendant would be expected to reciprocate. Bearing in mind that O. 14 is limited to cases to which the plaintiff verily believes there is no defence and has or has caused to be deposed in the affidavit in support to that effect and the defendant knows perfectly well the plaintiff's claim has to be met, the defendant is best advised not to oppose the summons and submit to judgment bearing in mind the consequences of making a false affidavit and the laws of contempt of Court in making a false statement of fact to the Judge upon which the defendant intends the Judge to rely in making a decision. On the other hand if a defendant is properly advised or has good reason to believe that there is a *bona fide* question or issue in dispute which ought to be tried or there ought for some other reason to be a trial, see O. 14 r. 3(1), there should be no difficulty in deposing thereto briefly and succinctly before the return day. Again by reference to Atkin's **Encyclopaedia** abovestated page 192, "generally speaking the facts upon which the defence relies are usually capable of concise expression, and a lengthy affidavit is unnecessary; indeed, a long, rambling affidavit full of irrelevant detail may bear the appearance of being a sham and if the defendant's affidavit is insufficient or inadequate in any respect, he may apply for and obtain (subject to any question of costs) an adjournment to file further evidence to supplement or supply any deficiencies".

As to a plaintiff wishing to file an affidavit in reply to a defendant's affidavit, unlike the case of a defendant, there is nothing in the Rules giving a plaintiff a right to do so and accordingly it is not surprising that there is no time provision for such an affidavit. A plaintiff will need to obtain the leave of the Court to do so. See *Davis v. Spence* [1876] 1 CPD 719, 25 WR 229, 2 Char Pr Cas 235, *Girvin v. Grepe* [1879] 13 ChD 174; 49 LJ Ch 63; 41 LT 522, 28 WR 123 and *Rotherham v. Priest* [1879] 49 LJQB 104; 41 LT 558; 28 WR 277. In as much as leave of Court is required, the judicial mind will have to be

a applied to the circumstances pertaining and in this regard once again I refer to Atkin's book abovestated, this time at page 193 where it reads:

b There is no object or value in an affidavit in reply by the plaintiff which merely contradicts on oath the sworn statements of the defendant, for the case cannot be tried on the affidavits *Saw v. Hakim* [1889] 5 TLR 72, per Pollock B. Where the defendant is able to set up a triable issue, an affidavit in reply will usually merely have the effect of emphasising that there is an issue to be tried. On the other hand, if the plaintiff by his affidavit in reply can clearly establish that there is no real defence by setting up undisputed facts *Shurmur v. Young* [1888] 5 TLR 155, CA see also *Bank fur Gemeinwirtschaft v. City of London Garages Ltd.* [1971] 1 All ER 541 [1971] 1 WLR 149, CA or by exhibiting some undoubted document *Saw v. Hakim* [1889] 5 TLR 72, he may obtain summary judgment *Girvin v. Grepe* [1879] 13 ChD 174, CA; *Bank fur Gemeinwirtschaft v. City of London Garages Ltd.* [1971] 1 All ER 541, [1971] 1 WLR 149, CA or the defendant may be granted leave to defend on terms, for example, of bringing the whole or a substantial part of the sum claimed into Court *Lloyd's Banking Co. v. Ogle* [1876] 1 Ex D 262, per Bramwell B.

c If the plaintiff so requests, he will generally be given leave to file an affidavit in reply, subject to the question of costs, for until he files his further evidence its value remains unknown. In such a case, the hearing of the summons for judgment will usually be adjourned to enable the plaintiff to consider and if necessary to file further evidence. At the same time, if the defendant so requests, he too will be given leave to file further evidence if so advised. It is generally better for both parties to have the fullest opportunity of placing all the evidence they desire before the Court. In any case, if the master refuses leave to file further evidence, the Judge on appeal may give such leave.

d It follows that if the Court is minded to grant such leave it will also stipulate the time within which the affidavit is to be filed and likewise in the rare instance of subsequent affidavits being permitted by the Court to be filed.

e As I understand it rule 13 originally stood as it now does in subrule 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing

affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rule Committee in introducing Rule 13(2) intended that its provisions should apply to the well entrenched and I would say more stringent procedure applicable to O. 14.

Order 32 r. 3 of the Rules is in *pari materia* with the same numbered English rule which, disregarding the exception therein, reads as follows:

... unless the Court otherwise orders or any of these rules otherwise provides, a summons must be served on every other party not less than two clear days before the day so specified.

In the **Supreme Court Practice 1993**, Vol. 1, paragraph 32/1-6/8 it is stated in reference to the words "unless the Court otherwise orders" that a summons under O. 14 r. 1 is an exception to Rule 3 last referred to. It follows by analogy that Rule 13(2) does not apply to an O. 14 application.

For the reasons abovestated I find that the provisions of O. 32 r. 13(2) of the Rules of the High Court 1980 do not apply to proceedings brought under O. 14 of the said Rules or to affidavits filed or intended to be filed thereunder. Accordingly the defendant's affidavit herein stands filed as of right and if the plaintiff wishes to file an affidavit in reply thereto the plaintiff will need to obtain the leave of the Court so to do.

PUBLIC PROSECUTOR

v.

ALCONTARA

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CRIMINAL TRIAL NO. 47(58)-39-88]
18 JUNE 1994

CRIMINAL LAW: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 s. 39B(1)(a) - Whether plant material contained cannabis resin large enough to be used in the manner prohibited by the Act - Quantitative test - Finding by chemist of mere presence of cannabis resin in plant samples - Whether definition of cannabis under old s. 2 of the Act proved.

CRIMINAL PROCEDURE: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 s. 39B(1)(a) - End of defence case - Reasonable doubt test - Defence that accused was under the belief that he was conveying fish keropok - Whether reasonable and probable.

EVIDENCE: Conviction on circumstantial evidence - Whether Court to be guided by best evidence rule - Finger print evidence - Whether a strict requirement.

EVIDENCE: Expert evidence - Evidence of chemist - Probative value thereof - Whether comparative approach to such evidence ought to be adopted.

The accused herein was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (the Act) for trafficking in 70952.1 grams of cannabis. He was acquitted by the High Court without his defence being called on the sole ground that the prosecution had failed to prove at the close of its case that the offending item was cannabis as defined under the old s. 2 of the Act. On appeal by the Public Prosecutor to the Supreme Court, the High Court's decision was overturned and while reverting the case back to the High Court for continuation of hearing, it was ordered that the accused be called to enter upon his defence.

The accused in his defence did not deny that at the time of arrest he was the sole occupant of the car wherein the said cannabis were found, but contended that he was labouring under the belief that he was only conveying fish keropok. At the end of the defence case, Counsel for the accused raised three main issues which he alleged were sufficient to entitle the accused to an acquittal.